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**IN THE
COURT OF APPEALS OF INDIANA**

HASKELL E. MOORE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 63A01-0510-CR-471

APPEAL FROM THE PIKE CIRCUIT COURT
The Honorable Jeffrey L. Biesterveld, Judge
Cause No. 63C01-0501-FB-65

September 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Haskell E. Moore appeals his convictions, after a jury trial, of dealing in methamphetamine, a class B felony; possession of two or more chemical reagents or precursors with the intent to manufacture methamphetamine while in possession of a firearm, a class C felony; possession of methamphetamine, a class C felony; maintaining a common nuisance, a class D felony; and unlawful use of a police radio, a class B misdemeanor.

We affirm in part and reverse in part.

ISSUE

1. Whether the trial court erred when it admitted evidence of Moore's prior use of methamphetamine.
2. Whether sufficient evidence supports Moore's conviction of possession of a police radio.

FACTS

On January 26, 2005, an affidavit by Indiana State Police Trooper Mark Green averred that various evidence indicated that Danny Moore was engaged in drug activity at the property of Robert Moore, 9846 East Oak Street in Velpen. A search warrant was issued, and shortly after midnight on January 27th, Green led a group of officers in executing the warrant at the property – which included two joined mobile homes, a two-car garage, and a large lot filled with piles of junk and numerous abandoned vehicles.

When Green entered the side door of the garage, he saw a building filled with “junk” piled everywhere. (Tr. 53). Moore appeared from around a Bronco vehicle in a narrow aisle between the Bronco and the junk; he was escorted outside. A woman, Rachael Murray, then

appeared, and she was also escorted outside. Moore asked Green “to move the cot away from the woodburner so it didn’t burn his bed and his clothing.” (Tr. 115). In the garage, police observed a sleeping cot with “clothing stacked around it” located “between the woodburner and the desk.” (Tr. 116, 328). Inside the two connected single mobile homes, officers located two young children asleep in a bedroom where they also found coffee filters that tested positive for methamphetamine or precursors.

Green found “numerous burnt foils” and cut straws, used to smoke methamphetamine, lying “out in the open.” (Tr. 57). Additional evidence of methamphetamine use and its production was also present in the garage. Q-tips, foil, glass jars, a can containing coffee filters, an eyeglass holder, and sidecut pliers¹ were on top of a table by a desk. Also on the table was a tin holding “quite a bit of drug paraphernalia” -- burnt foil, cut-off corners of plastic bags that appeared coated with powder, wire ties, syringes, and a spoon. (Tr. 62). Another tin held used foil, wire ties, and a baggie corner. In the open desk were burnt foils, plastic tubing, a can of starting fluid,² sandwich baggies, and a coffee grinder with a white residue, and underneath it were two blenders with a white powder residue. Nearby stood a 30/30 rifle. Also found in the garage were some used coffee filters, a homemade smoking bong, a can of camping fuel, a can of Liquid Fire,³ and an operating police scanner radio.

¹ This tool is used to separate batteries and obtain the lithium for the first stage of methamphetamine production.

² Starting fluid contains ether, one of the prohibited “chemical reagent or precursors.” See Ind. Code § 35-48-4-14.5.

³ Liquid Fire is “sulfuric acid,” (Tr. 168), which is also one of the prohibited “chemical reagent or precursors.” See I.C. § 35-48-4-14.5.

Outside the garage, Green detected the odors of ether and anhydrous ammonia. A “distinct path” led to a van, where the odors were stronger. (Tr. 91). When Green opened the rear door of the van, he saw a cooler containing what appeared to be a reaction vessel – wherein ether, lithium, cold pills and anhydrous ammonia are combined “to cook off.” (Tr. 89). Because this constituted an explosive hazard and required disassembly, Green requested a clandestine lab team. Trooper Doug Humphrey and other members of the team responded.

On January 28, 2005, the State charged Moore with dealing in methamphetamine, a class B felony⁴; possession of two or more chemical reagents or precursors with the intent to manufacture methamphetamine while in possession of a firearm, a class C felony; possession of methamphetamine, a class C felony; maintaining a common nuisance, a class C felony; and unlawful use of a police radio, a class B misdemeanor.⁵ Moore filed a pretrial motion in limine, seeking to bar (1) evidence of his prior conviction for possession of methamphetamine, and (2) the proposed testimony by Catrina Bolin that she had observed Moore use methamphetamine in January 2005 and the month before. The trial court ordered that even if Moore testified, evidence of his 2003 methamphetamine possession conviction would be inadmissible. However, the trial court held that Bolin could testify as proposed, and would give a limiting instruction if she testified. The jury trial was held July 20 – 22, 2005.

⁴ The statute provides that “[a] person who knowingly or intentionally manufactures . . . methamphetamine . . . commits dealing in . . . methamphetamine, a class B felony offense.” Ind. Code § 35-48-1-1.

⁵ At trial, technical amendments were made to the charges to conform to the evidence presented.

Photographs of the Moore premises and the garage were admitted, and a diagram of the garage contents' arrangement was drawn for the jury. Green testified as to how the various items found in the garage were associated with the use of production of methamphetamine. Humphrey, the chemist with the clandestine lab team, testified that inside the cooler found in the van was a glass container holding ether, and another container holding a purple sludge and liquid with a high concentration of ammonia. Humphrey further testified that the van contained a bag of coffee filters, a carton of salt, a funnel, a punched can of starting fluid, and a length of plastic tubing. Humphrey, explained how methamphetamine was produced, beginning with the crushing of cold tablets that contain pseudoephedrine in a blender or coffee grinder, and how the items found in the van and garage were used in the process. The forensic scientist from the Indiana State Police Lab testified that her testing confirmed that the evidence seized included methamphetamine and that other items tested positive for methamphetamine or pseudoephedrine.⁶

Bolin testified that in December of 2004 and January of 2005, she had frequently visited the Moore garage "to do drugs," to smoke "meth." (Tr. 147). Moore renewed his objection, which was overruled, and he requested a limiting instruction. The trial court instructed the jury:

Evidence is to be introduced that the defendant was involved in wrongful conduct other than charged in the information. The evidence that is to be received is received solely on the issue of the defendant's motive, knowledge and/or absence of mistake. This evidence should be considered by you only for that limited purpose.

⁶ Pseudoephedrine is one of the prohibited "chemical reagents or precursors." I.C. § 35-48-4-14.5.

(Tr. 150). Bolin then testified that during the months of November 2004 through January 2005, Danny had provided her with meth; that she had smoked it in the garage; that Moore was often present when she was smoking meth in the garage; and that Moore had smoked meth with her. She further testified that she had seen people other than Danny “get into the desk.” (Tr. 156).

Moore testified that his brother, Robert Moore, was letting him stay in the garage because he was homeless. He further testified that he had seen Robert’s son Danny “use[] meth there” several times; that Rachael⁷ “would come to the garage and do her drugs”; that he “suspected” that Danny was producing methamphetamine on the property; and that the items seized either belonged to Danny or Rachael or he had never seen them before. (Tr. 337, 314, 338). Moore also testified he “wasn’t using meth” in 2005, and that “the last time [he] done [sic] meth” was when he “got arrested by Officer Pool in . . . late 2002.” (Tr. 337, 338). The jury convicted Moore as charged.

DECISION

1. Admission of Evidence

Moore argues that he is entitled to a new trial because the trial court erred when it ruled that testimony by Bolin about his recent use of methamphetamine was admissible under Indiana Evidence Rule 404(b). According to Moore, this was error because “neither motive, knowledge or absence of mistake was at issue at trial.” Moore’s Br. at 6.

⁷ According to Moore, Rachael was Danny’s girlfriend and lived with Danny and the children in the bedroom of the mobile home.

Evidence Rule 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts “to prove the character of a person in order to show action in conformity therewith.” Ind. Evid. R. 404(b). However, Evidence Rule 404(b) further provides that evidence of other crimes, wrongs or acts “may . . . be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” Id.

When addressing the admissibility of evidence under Indiana Evidence Rule 404(b), the trial court first assesses whether the evidence has some relevancy to a matter at issue other than the defendant’s propensity to commit the charged act, and then it weighs the probative value of the evidence against its prejudicial effect, pursuant to Evidence Rule 403. Scalissi v. State, 759 N.E.2d 618, 623 (Ind. 2001). We review the trial court’s admissibility determination applying an abuse of discretion standard. Id.

Moore was charged with having knowingly manufactured methamphetamine. He was further charged with having knowingly possessed two or more chemical reagents or precursors with the intent to manufacture methamphetamine while also in possession of a firearm. Moore was also charged with having knowingly possessed methamphetamine while in possession of a firearm. Finally, he was charged with having knowingly maintained his residence, which was being used to unlawfully manufacture methamphetamine. These offenses each contain an element that requires proof of the defendant’s knowledge. Bolin’s testimony that Moore was present when she and others smoked meth in the garage, and that Moore had smoked meth himself, is probative on the issue of whether Moore had knowledge of methamphetamine and its use. Thus, her testimony was admissible to prove Moore’s

knowledge, and the evidence of Moore's knowledge is also relevant as to whether he committed the charged offenses. Moreover, the trial court instructed the jury on the limited purpose for which her testimony was admitted, and we presume the jury followed that instruction. See Scalissi, 759 N.E.2d at 623.

Further, Moore's own testimony established that he was living in the garage. Other testimony established that various items that are used in the manufacture of methamphetamine were visible in the open desk, on the table, and elsewhere in very close proximity to where Moore was living in the garage. Further, methamphetamine was fully visible in some items in the garage; also fully visible in the garage were items used in the manufacture of methamphetamine – including precursors such as ether, sulfuric acid, and traces of pseudoephedrine, and a rifle. In addition, the jury heard testimony concerning items in the garage that supported the inference that methamphetamine was packaged there.⁸ Additional evidence was presented as to the respective locations of various items in the garage.⁹ This evidence and the inferences supported by Bolin's testimony provide sufficient

⁸ The proscribed "manufacture" of drugs is defined to include "any packaging or repackaging of the substance I. C. § 35-48-1-18.

⁹ A diagram of the garage was drawn by one witness and used by several others to demonstrate the respective locations of the desk, the stove, Moore's sleeping cot, and the rifle. However, this exhibit was not included in the materials submitted to this court.

evidence to sustain Moore's convictions for dealing (manufacturing) cocaine, for possession of reagents or precursors while also possessing a firearm, possessing methamphetamine while also possessing a firearm, and maintaining a common nuisance.

We find that the trial court did not abuse its discretion when it admitted Bolin's testimony. Therefore, Moore's argument that this ruling entitles him to a new trial must fail.

2. Police Radio Offense

Moore also argues that the evidence was insufficient to prove that he committed the offense of possession of a police radio, a class B misdemeanor. The State concedes this to be true.

"In reviewing a claim of insufficient evidence, we will affirm the conviction unless, considering only the evidence and reasonable inferences favorable to the judgment and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Dunlap v. State, 761 N.E.2d 837, 839 (Ind. 2002).

The offense is defined as follows: "A person who knowingly or intentionally possesses a police radio . . . commits unlawful use of a police radio, a class B misdemeanor."

I. C. § 35-44-3-12. However, the statute contains numerous exceptions to criminal liability for possession of a police radio. One statutory exception provides that the offense is *not* committed by "a person who uses a police radio only in the person's dwelling." Id.

The evidence indisputably established that the garage was Moore's dwelling. Therefore, no reasonable fact-finder could have found the elements of the unlawful

possession of a police radio offense proven beyond a reasonable doubt. Dunlap, 761 N.E.2d at 839 (Ind. 2002). Accordingly, we reverse Moore's conviction of that offense.

Affirmed in part and reversed in part.

RILEY, J., and VAIDIK, J., concur.